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SUBJECT: MORE BRV POLICY CONTRADICTIONS: IPR "REFORM" AND
MERCOSUR

REF: CARACAS 366

¶1. (SBU) Summary: Venezuela's withdrawal from the Andean Community (CAN) in April 2006 has created legal uncertainty as to both the present and future legal framework of IPR. Venezuela must now deal with an awkward reality of three concurrent IPR regimes - vestiges of the CAN, outdated domestic legislation, and nascent Mercosur obligations. The BRV is expected to introduce controversial legislation under the Enabling Law that would further weaken IPR protections in Venezuela. The BRV's push for "southern" regional trade integration through Mercosur is incompatible with radical IPR "reform." In an example of the contradictions that have come to typify BRV politics, Chavez' legal advisors who are drafting radical IPR reform are also arguing for Venezuela to harmonize IPR protections with Mercosur members. Septel will address the broader political and economic dimensions of Venezuela's Mercosur integration. End Summary.

IPR Protection in the BRV: What Law Applies?

¶2. (SBU) Prior to Venezuela's withdrawal from the CAN, IPR protection was governed by CAN Commission Decision 486, signed in September 2000 by the Andean Commission. Decision 486 is one of over 650 Andean Community Decisions incorporated into Venezuela's domestic law. Decision 486 implements a common intellectual property regime for patents and trademarks in member states, while Decision 351 covers copyrights. These decisions obligate member states to provide most favored nation status to one another and national treatment.

¶3. (SBU) Venezuela's withdrawal from the CAN has created a legal vacuum for the IPR regime. Affected industries, in particular the pharmaceutical industry, called on Venezuela's courts to enunciate the applicable law regarding IPR after withdrawal from the CAN, which the judiciary has so far failed to do (Reftel). If Decision 486 were not the applicable law in Venezuela, the only alternative source of patent protection would be the outdated 1955 Law on Industrial Property. That said, there is an argument that the BRV would still be bound by Decision 486: according to Article 135 of the Cartagena Accord establishing the CAN, "advantages received and granted subsequent to a member

state's renunciation of the treaty remain in effect for a period of five years from the denunciation." The article does not specify whether it applies to goods and services or all the preferential provisions accorded under the Accord. Since IPR harmonization is referenced in Article 55 of the Cartagena Accord, the clear language of the provision would imply that Venezuela should continue to apply Decision 486 for a five year period with respect to other member states. Consequently, there appear to be three co-existent IPR regimes in Venezuela. Outdated domestic legislation - the Industrial Property Law of 1955 and Copyright Law of 1993, Decision 486 of the CAN for an additional five years, and Mercosur norms (see para 6).

Domestic Reform

14. (SBU) Post contacts in the pharmaceutical and recording industries told Econoff in February 2007 that radical IPR legislation with respect to copyright protection and patents is on the BRV's agenda this year. They expect that Chavez will introduce such legislation in the form of a decree-law pursuant to the Enabling Law, which grants him diktat powers for the next 16 months. The legislation was first discussed in 2005 but never placed on the National Assembly's legislative agenda. According to industry sources, the bill would essentially eviscerate IPR protection.

15. (SBU) Dr. Hildegard Rondon de Sanso is reportedly spearheading the BRV's IPR reform. (Note: Rondon, 73, is a former Venezuelan Supreme Court justice and Energy Minister Ramirez' mother-in-law. She is also rumored to be the primary drafter of constitutional reform, though she is not an official member of the President's Committee on

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Constitutional Reform. End Note.) Post has obtained a copy of a presentation she gave in late 2006 discussing IPR reform in Venezuela and obligations under the CAN and Mercosur. She previews what the BRV may contemplate on the horizon with respect to IPR reform. Rondon argues that three guiding points of IPR reform in Venezuela should be 1) industrial property norms have been established by patent producing developed countries and unfairly favor such countries; 2) Venezuela is a consumer of technology and not a producer; and 3) WTO IPR norms are being challenged by developing countries.

16. (SBU) The proposed copyright legislation would severely hamper domestic and foreign rights holders' ability to exploit their works in Venezuela. According to our industry contacts, the measure would violate 31 of Venezuela's bilateral and multilateral obligations, including TRIPS, if passed in its current form. The bill would reduce the period of protection from 60 to 50 years and give the BRV broad powers to expropriate artistic works for purposes of the "collective benefit." Proposed patent reform would further weaken provisions for test data protection and codify Venezuela's failure to protect second-use patents, such as Viagra, originally used to treat hypertension (Reftel).

Mercosur and IPR

17. (SBU) Venezuela acceded to the Treaty of Asuncion and Mercosur membership in July 2006, joining Argentina, Brazil, Uruguay and Paraguay as the fifth "full member" in the trading block. Venezuela is to extend full trade benefits to other member states by 2012. Mercosur's goal is to establish a common market and common external tariff. Generally, trade blocks strengthen IPR protections. The premise of IPR protections in Mercosur stems from the principle of territoriality, providing that each member state should define the scope of its intellectual property regime using

multilateral obligations such as TRIPS as a baseline. Mercosur envisions several measures to coordinate IPR protection because discordant IPR regimes can pose a substantial barrier to trade and circulation of goods and services. Two Mercosur protocols call for harmonization on industrial designs and trademarks. (Note: The protocol on industrial designs is not yet in force and Argentina and Brazil have yet to deposit the protocol on trademarks. End Note.) The Mercosur protocols aim to set minimal standards of common protection to ensure that the common market functions smoothly. Specific areas of IPR protection that Mercosur seeks to harmonize are patentability, licensing requirements, duration of patent and trademark rights, and parallel imports/exports.

18. (SBU) According to Article 27 of the 1995 Protocol of Harmonization of Norms on Intellectual Property in Mercosur for Trademarks, National Origin, and Denomination of Origin, countries that accede to the Treaty of Asuncion agree to be bound by the provisions of the Protocol. According to Rondon, Mercosur also envisions creation of a supranational patent office responsible for issuing community-level patents. During a March 28 conference on Mercosur in Caracas, Hernando Diaz, a partner in the U.S. law firm Squire Sanders, offered IPR protections as an example of an area in which the BRV's domestic legal reform would have to be more restrained out of respect for Mercosur integration.

Comment

19. (SBU) Venezuela's IPR regime is currently an awkward mix and match from antiquated domestic legislation, CAN decisions and fledgling Mercosur obligations. A mitigating factor in analyzing potential damage that BRV IPR legislation could wreak on Mercosur is that the trade bloc's other four members historically have shown little interest in stringent IPR protections. However, the fact that a key BRV legal advisor is drafting radical domestic IPR reform on the one hand, and lecturing on Mercosur IPR harmonization on the other, underscores the contradictions in BRV policy, which have

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become more and more typical.

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